

USDC SDNY Case 1:14-cv-03042-RMB-AJP Document 330 Filed 08/26/15 Page 1 of 2
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August 26, 2015

VIA ECF

Hon. Andrew J. Peck, U.S.M.J.
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street, Courtroom 20D
New York, New York 10007

Approved.

SO ORDERED:


Hon. Andrew Jay Peck
United States Magistrate Judge

Copies by ECF to:

Re: Rio Tinto plc v. Vale S.A., et al., Civil Action No. 14-cv-3042 (RMB) (AJP) (S.D.N.Y.)All counsel
Judge Berman

Dear Judge Peck:

We write on behalf of Defendant Vale to seek an order pursuant to Fed. R. Evid. 502(d) confirming that Vale may produce in the above-captioned litigation certain communications between Vale and Defendant BSGR.

The documents in question are communications between Vale and BSGR concerning the Guinean Technical Committee's investigation of alleged bribery or corruption by BSGR in connection with its obtaining the rights to Simandou Blocks 1 and 2 prior to the joint venture between Vale and BSGR. They do not contain any privileged information of Vale's but do contain information belonging to BSGR that could be considered privileged but that was shared with Vale. In the documents, Vale urges that BSGR answer the questions of the Technical Committee and not interpose procedural objections. They are thus evidence of consciousness of innocence and of the absence of any conspiracy involving Vale to bribe Guinean officials.

Vale's position is that at the time the communications were made no common interest existed between BSGR and Vale with respect to the Technical Committee's investigation. BSGR and VBG have taken the contrary position – that at the time of the Technical Committee's investigation of BSGR a common interest existed between Vale and BSGR as to that investigation – and BSGR has purported to reserve its rights to seek to establish that common interest through deposition testimony and, if successful, to assert common interest protection and, presumably, seek to recall the documents. Rio Tinto has argued, in its papers

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with respect to the Nardello Report, that Vale and BSGR shared a common interest as of April 2013 in the maintenance of the Simandou rights (although more recently it has argued in meet-and-confers that no such common interest existed).

Accordingly, Vale seeks an order pursuant to Fed. R. Evid. 502(d) permitting Vale to produce the communications between Vale and Defendant BSGR without effecting a broader subject matter waiver and without prejudice to any party's rights to argue the existence of a common interest privilege depending on the development of the evidence.¹ Such an order would permit Vale to produce the documents at issue now while at the same time preserving the parties' opportunity to argue later, based on any evidence that BSGR might develop, that its privileged information should be clawed back. BSGR has stated it has no objection to the production of the documents under Fed. R. Evid. 502(d).

Respectfully submitted,

/s/ Lewis J. Liman
Lewis J. Liman

cc: All counsel of record (via ECF)

¹ Alternatively, Vale would be prepared to make an ex parte submission to Your Honor outlining the contents of the documents, or to submit the documents themselves for in camera review, in order for the Court to determine whether they are privileged.